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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 602

THEOBALD INDUSTRIES, INC., PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The *per curiam* opinion of the Court of Claims (R. 24-28) is reported at 115 F. Supp. 699.

JURISDICTION

The judgment of the Court of Claims was entered on October 6, 1953 (R. 24). A motion for rehearing was denied on December 1, 1953 (R. 28). The petition for a writ of certiorari was filed on February 24, 1954. While the petition does not disclose the basis for the jurisdiction of this Court, it is assumed that such jurisdiction is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Under the First War Powers Act, implemented by Executive Order 10210 and regulations, the Army Contract Adjustment Board is authorized to confer extra-legal or gratuitous relief on a private contractor whenever the Board determines "as a matter of sound judgment to be made on the basis of all of the facts" that the "national defense will be facilitated" by such relief. The Board, "under all the circumstances, [was] of the view that the facts of this case" did not justify granting such relief to petitioner.

The question presented is whether the Court of Claims, after finding that the Board had not abused its discretion nor acted arbitrarily or capriciously, properly refused to set aside the Board's denial of relief to petitioner.

STATUTES, EXECUTIVE ORDER, AND REGULATIONS INVOLVED

Title II, Section 201 of the First War Powers Act (Act of December 18, 1941, 55 Stat. 838, 50 U.S.C. App. 611, as amended and extended to June 30, 1954 by 64 Stat. 1257, 66 Stat. 295, and 67 Stat. 132), the pertinent provisions of Executive Order 10210 (16 F.R. 1049), and the pertinent provisions of the Joint Regulations of the Armed Forces under the Act and Executive Order are set forth in the Appendix, *infra,* pp. 10-17.

STATEMENT

Petitioner brought this action in the Court of Claims, seeking review of an Army Contract Adjustment Board's denial of its claim under the

First War Powers Act for gratuitous relief on certain Army contracts. The facts, which are not in dispute, are as follows:

Petitioner, a New Jersey corporation, uses waste fats, grease and bones in manufacturing tallow (R. 1). On May 28, 1951, the Government accepted petitioner's bid for the purchase of such waste materials to be accumulated from July 1, 1951, to June 30, 1952, at certain military installations in New Jersey (R. 1-2, 6A). Accordingly, in contracts entered into on May 28 and June 22, 1951, the Government agreed to sell and petitioner agreed to buy the various waste materials for the one-year contract term at the prices it had bid (R. 2, 6A, 24).

By the end of the contract period, June 30, 1952, petitioner had received a total of 1,285,507 pounds of waste materials, for which, pursuant to the contract prices, it paid $96,094.80 (R. 2). In the meanwhile, the 15-cent maximum ceiling price established by the Office of Price Stabilization on fancy tallow in March 1951 was reduced, effective January 14, 1952, to 10½ cents per pound. O.P.S. Ceiling Price Regulation No. 6, Amendments 2, 11. 16 F.R. 2224, 2225; 17 F.R. 279. The Statement of Considerations (issued by O.P.S.) concerning the reduced ceiling price showed that the 15-cent maximum prescribed in March 1951 "proved illusory and crumbled" so that, even in advance of the "rollback" in January 1952 to 10½ cents, tallow was "selling as low as 8 cents per pound." 17 F.R. 279.

Petitioner, claiming that the reduction in the maximum permissible selling price of tallow caused

it to sustain a loss of $44,793 on its May and June 1951 Army contracts, submitted a request under the First War Powers Act, as amended, for refund and for adjustment of the prices it had agreed to pay in those contracts (R. 18). The Army Contract Adjustment Board, noting that the alleged loss would not so affect the petitioner's "financial position as to impair its productive ability," determined that "under all the circumstances * * * the facts of this case" do not warrant the granting of any gratuitous relief to petitioner under the First War Powers Act and the regulations promulgated thereunder (R. 20, 21).

Petitioner then filed this suit in the Court of Claims (R. 1-5). Its petition, asserting jurisdiction under Section 10 of the Administrative Procedure Act, asked the Court of Claims to "reverse the decision of the Army Contract Adjustment Board" and to enter judgment against the United States for the alleged loss of $44,793 (R. 5). The United States moved for summary judgment (R. 8). In a *per curiam* opinion, sustaining the validity of the regulations pursuant to which the Board denied petitioner's claims and refusing to set aside the Board's decision, the Court of Claims granted the motion and dismissed the petition (R. 24-28).

ARGUMENT

The decision of the Court of Claims, refusing to upset a factual determination of the Army Contract Adjustment Board in a matter involving the exercise of that Board's discretion and judgment, is

clearly correct. There is no conflict. Review by this Court is, we submit, unwarranted.

1. The First War Powers Act, as amended, *infra*, pp. 10-12, empowers the President to authorize any department to award *gratuitous* relief to government contractors in order "to facilitate the national defense." And by Section 4 of Executive Order 10210, *infra*, pp. 13-14, the President authorized the granting of such extra-legal relief, as a matter of grace, to government contractors "whenever, in the judgment of the Secretaries of Defense, the Army, the Navy, or the Air Force, respectively, or their duly authorized representatives, the national defense will be thereby facilitated." In the instant case, the Army Contract Adjustment Board, the duly authorized representative of the Army (32 C.F.R. 438.4(a)), was unable to conclude after an examination of all the pertinent facts and circumstances that the grant of extra-legal relief to petitioner would facilitate the national defense. To the contrary, the Board, exercising its sound judgment, expressly found that petitioner's alleged loss on its Army contracts would not impair its productive ability and accordingly denied petitioner's request for relief.

The correctness of the decision below, in refusing to upset the Board's determination, cannot seriously be challenged. The rule is settled that a court will not undertake an independent evaluation of the evidence and displace an administrative finding which, like the instant one, concerns the specific application of a broad statutory term, requiring

the appraisal of particular facts and circumstances. Cf. *Shields* v. *Utah Idaho R. Co.*, 305 U.S. 177, 186; *Sunshine Coal Co.* v. *Adkins*, 310 U.S. 381, 390, 400; *Rochester Tel. Corp.* v. *United States*, 307 U.S. 125, 145-146; *Unemployment Comm'n* v. *Aragon*, 329 U.S. 143.

The need for applying this rule in the instant case is strongly emphasized because a request for administrative relief under the First War Powers Act cannot be demanded as a matter of right but is simply a plea for gratuitous relief addressed to the discretion of the administrative agency and calls upon the agency's exercise of its "sound judgment to be made on the basis of all of the facts" of the case. 32 C.F.R. 438.2(b), *infra*, p. 16. The whole history of extra-legal relief under the First War Powers Act, since it was first enacted in December 1941, has been one of numerous administrative grants and denials, all within the sole discretion and competence of the Executive unsupervised by the courts. See *Forgarty* v. *United States*, 340 U.S. 8, 11.[1] Where Congress has reposed such discretion in administrative officials, particularly where gratuitous benefits are involved, the judiciary has long refused to intervene or

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[1] For detailed discussions of the administration of First War Powers Act relief in World War II, including examples of the forms such relief took, see Rowley, "The First War Powers Act Cases" in Shepherd, *Cases and Materials on the Law of Contracts* (2d ed. 1946), pp. 1233-1261; Fain and Watt, *War Procurement—A New Pattern in Contracts*, (1944) 44 Col. L. Rev. 127, 194-206; Kramer, *Extraordinary Relief for War Contractors*, (1945) 93 U. of Pa. L. Rev. 357; cf. 40 Op. Atty. Gen. 225.

review. Cf. *Wilbur* v. *United States*, 281 U.S. 206; *Denby* v. *Berry*, 263 U.S. 29; *French* v. *Weeks*, 259 U.S. 326, 335-6; *Louisiana* v. *McAdoo*, 234 U.S. 627, 633; *Reaves* v. *Ainsworth*, 219 U.S. 296, 304; *Keim* v. *United States*, 177 U.S. 290, 292. These considerations make it plain that "the exercise of this power [to grant relief under the First War Powers Act] rests with the proper officials of the procurement agencies—not with the courts." *Saligman* v. *United States*, 56 F. Supp. 505, 508 (E.D. Pa.) (per Kalodner, J.); *Waller* v. *United States*, 114 C. Cls. 640, 645.[2]

2. Nor is there any substance to petitioner's argument that the Defense Department regulations (see *infra*, pp. 14-17), under which the Board denied petitioner relief, are inconsistent with the purpose of Congress in enacting and extending the First War Powers Act and that the court below therefore erred in refusing to review those regulations (Pet. 3, 4).

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[2] If the Administrative Procedure Act is applicable at all, it is appropriate to note that Section 10 of that Act does not allow judicial review where "agency action," like that involved here, "is by law committed to agency discretion." 60 Stat. 243.

A similarly fatal defect exists if petitioner's claim is viewed as an attack on the "rollback" of the ceiling price of tallow from 15 cents to 10½ cents per pound. *Supra*, p. 3. Original jurisdiction over such an action is in the Emergency Court of Appeals and not in the Court of Claims. Section 408 of the Defense Production Act of 1950 (50 U.S.C. App. 2108 (c), (d)) vests in the Emergency Court of Appeals, and in this Court upon review of judgments of the Emergency Court, "exclusive jurisdiction" to determine the validity of any regulation or order relating to price control, and further provides that no other court "shall have jurisdiction or power to consider the validity of any such regulation or order."

For present purposes, the short and conclusive answer to this argument is that the record shows that the Court of Claims not only considered and reviewed the challenged regulations but also sustained their validity. Petitioner had contended in the court below, as it does here, that the regulations were invalid "because they limit relief for losses on fixed-price contracts to contractors whose work is found to be essential to the national defense" (R. 26). And petitioner further urged on the basis of Senate Report No. 1498, 82d Cong., 2d Sess., that the regulations should have authorized "relief to fixed-price contractors suffering losses, regardless of whether they were essential" (Pet. 3). The opinion below, after taking into account these contentions, specifically "conclude[s] that the regulatory requirement that the criterion for contract modification under this [First War Powers] act shall be whether or not the national defense will be facilitated, is not in violation of the statute" (R. 28).

Moreover, petitioner's entire argument as to the invalidity of the administrative regulations is based, as already noted, on views expressed in Senate Report No. 1498, 82d Cong., 2d Sess. This report was filed on May 1, 1952, more than a decade after the First War Powers Act originally became law on December 18, 1941, and almost 16 months after the Act was extended on January 12, 1951, for the duration of the national emergency resulting from the Korean conflict (Pet. 3-7). Such "subsequent events" in May 1952, as this Court has

pointed out in rejecting a similar "legislative history" argument as to the Lucas or War Contracts Hardship Claims Act, 60 Stat. 902, can "not supplant the contemporaneous intent of the Congress" which originally enacted the First War Powers Act. *Fogarty* v. *United States,* 340 U.S. 8, 13-14; see also *United States* v. *Mine Workers,* 330 U.S. 258, 281-282; *Hartford Electric Light Co.* v. *Federal Power Comm.,* 131 F. 2d 953, 964 (C.A. 2), certiorari denied, 319 U.S. 741. The propriety of rejecting such a subsequent "legislative history" argument in this case is underscored by the abortive nature of attempts after Senate Report No. 1498 to have Congress amend the First War Powers Act so as to enact into law the "legislative intent" reflected by that Report. See *e.g.,* H.R. 3715, 83d Cong., 1st Sess., and House Judiciary Comm. Legis. Calendar, February 25, 1954, pp. 52, 67; S. 1175, 83d Cong., 1st Sess., and 99 Cong. Rec. 6779, 7123-4.

CONCLUSION

The decision below is correct and presents no conflict. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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APRIL, 1954.

APPENDIX

1. a. Title II, Section 201 of the First War Powers Act (Act of December 18, 1941, 55 Stat. 838, 839, 50 U.S.C. App. 611) provides:

> The President may authorize any department or agency of the Government exercising functions in connection with the prosecution of the war effort, in accordance with regulations prescribed by the President for the protection of the interests of the Government, to enter into contracts and into amendments or modifications of contracts heretofore or hereafter made and to make advance, progress and other payments thereon, without regard to the provisions of law relating to the making, performance, amendment, or modification of contracts whenever he deems such action would facilitate the prosecution of the war: *Provided,* That nothing herein shall be construed to authorize the use of the cost-plus-a-percentage-of-cost system of contracting: *Provided further,* That nothing herein shall be construed to authorize any contracts in violation of existing law relating to limitation of profits: *Provided further,* That all acts under the authority of this section shall be made a matter of public record under regulations prescribed by the President and when deemed by him not to be incompatible with the public interest.

b. The Act of January 12, 1951, 64 Stat. 1257, which extended Section 201 of the First War Powers Act for the national emergency declared by the President on December 16, 1950, but in no event for a period beyond June 30, 1952, provides:

That section 201 of the First War Powers Act, 1941 (55 Stat. 838) is hereby amended by striking out the words "the prosecution of the war effort" and the words "the prosecution of the war" appearing in such section, and inserting in lieu of each stricken provision the words "the national defense"; and such section 201 is further amended by striking out the period at the end thereof and inserting in lieu thereof a colon and the following: "*Provided further,* That all contracts entered into, amended, or modified pursuant to authority contained in this section shall include a clause to the effect that the Comptroller General of the United States or any of his duly authorized representatives shall have access to and the right to examine any pertinent books, documents, papers, and records of the contractor or any of his subcontractors engaged in the performance of and involving transactions related to such contracts or subcontracts."

SEC. 2. Title II of such Act, as amended, shall remain in force during the national emergency proclaimed by the President December 16, 1950, or until such earlier time as the Congress by concurrent resolution or the President may designate, but in no event beyond June 30, 1952.

SEC. 3. Nothing in this Act shall prejudice anything heretofore done under the said title II of the First War Powers Act, 1941, or the continuance in force of any action heretofore taken thereunder.

c. The Act of June 30, 1952, 66 Stat. 295, which extended the June 30, 1952 date to June 30, 1953, provides:

> That section 2 of the Act of January 12, 1951 (64 Stat. 1257), is hereby amended by striking out "1952" and inserting in lieu thereof "1953".

d. The Act of June 30, 1953, 67 Stat. 132, which extended the June 30, 1953 date to June 30, 1954, provides:

> That section 2 of the Act of January 12, 1951 (Public Law 921, Eighty-first Congress) as amended (Public Law 426, Eighty-second Congress), is further amended by deleting the date "June 30, 1953" and inserting in lieu thereof the date "June 30, 1954".

2. Executive Order 10210, February 2, 1951 (16 F.R. 1049) provides in pertinent part:

> AUTHORIZING THE DEPARTMENT OF DEFENSE AND THE DEPARTMENT OF COMMERCE TO EXERCISE THE FUNCTIONS AND POWERS SET FORTH IN TITLE II OF THE FIRST WAR POWERS ACT, 1941, AS AMENDED BY THE ACT OF JANUARY 12, 1951, AND PRESCRIBING REGULATIONS FOR THE EXERCISE OF SUCH FUNCTIONS AND POWERS.
>
> By virtue of the authority vested in me by the First War Powers Act, 1941, as amended by the act of January 12, 1951, entitled "An Act to amend and extent title II of the First War Powers Act, 1941" (Public Law 921, 81st Congress), hereinafter called the Act, and as President of the United States and Commander in Chief of the armed forces of the

United States, and deeming that such action will facilitate the national defense, it is hereby ordered as follows:

PART I

Under such regulations, which shall be uniform to the extent practicable, as may be prescribed or approved by the Secretary of Defense:

1. The Department of Defense is authorized, within the limits of the amounts appropriated and the contract authorization provided therefor, to enter into contracts and into amendments or modifications of contracts heretofore or hereafter made, and to make, advance, progress, and other payments thereon, without regard to the provisions of law relating to the making, performance, amendment, or modification of contracts.

2. The Secretaries of Defense, the Army, the Navy, and the Air Force may exercise the authority herein conferred and, in their discretion and by their direction may delegate such authority to any other military or civilian officers or officials of their respective departments, any may confer upon any such military or civilian officers or officials the power to make further delegations of such authority within their respective departments.

* * * * *

4. The Department of Defense may by agreement modify or amend or settle claims under contracts heretofore or hereafter made, may

make advance, progress, and other payments upon such contracts of any per centum of the contract price, and may enter into agreements with contractors or obligors, modifying or releasing accrued obligations of any sort, including accrued liquidated damages or liability under surety or other bonds, whenever, in the judgment of the Secretaries of Defense, the Army, the Navy, or the Air Force, respectively, or their duly authorized representatives, the national defense will be thereby facilitated. Amendments and modifications of contracts may be with or without consideration and may be utilized to accomplish the same things as any original contract could have accomplished hereunder, irrespective of the time or circumstances of the making, or the form, of the contract amended or modified, or of the amending or modifying contract, and irrespective of rights which may have accrued under the contract or the amendments or modifications thereof.

* * * * *

3. The Joint Regulations of the Armed Forces under the First War Powers Act and Executive Order 10210 provide in pertinent part:

> 32 C.F.R. § 438.1 *General considerations.* (a) By Title II of the First War Powers Act, 1941, 50 U.S.C. App., 611, as amended by Public Law 921, 81st Congress (referred to in this part as to the "act") and Executive Order No. 10210, dated February 2, 1951, (3 CFR, 1951 Supp., p. 72) the Secretaries of Defense,

Army, Navy and Air Force have authority, under such regulations as may be prescribed or approved by the Secretary of Defense, to enter into contracts and into amendments or modifications of contracts, heretofore or hereafter made, and to make advance, progress, and other payments thereon, without regard to the provisions of law relating to the making, performance, amendment, or modification of contracts.

(b) The regulations in this part set forth the standards governing the exercise of certain of the authority made available by said act and Executive order. The regulations in this part do not purport to cover all the authority conferred by the act and Executive order, but are confined to (1) amendments of contracts without consideration, (2) correction of mistakes in contracts, and (3) formalization of informal commitments. The exercise of other authority conferred by the act and Executive order will await the issuance of supplemental regulations.

(c) The authority granted by the act and the Executive order as described herein is an extraordinary one and its exercise must be carefully administered. Carelessness and laxity on the part of contractors should not be encouraged by the practice of granting relief to such contractors even though denial of relief in a particular case may result in some lack of cooperation on the part of a contractor.

32 C.F.R. § 438.2 *Standards governing exercise of authority.* (a) Any action taken under

this section must be based on a finding that the national defense will be facilitated thereby.

(b) The determination of whether in a particular case a contract amendment to be entered into without consideration, or the correction of a mistake or ambiguity in a contract, or the formalization of an informal commitment will facilitate the national defense is a matter of sound judgment to be made on the basis of all of the facts of such case. Although it is obviously impossible to predict or enumerate all the types of cases with respect to which relief may appropriately be granted, examples of certain cases or types of cases where relief may be proper are set forth in this paragraph. Such enumeration is not intended to exclude other cases where the circumstances are such as to warrant the granting of relief, and even in the enumerated cases other factors may result in a denial of relief.

EXAMPLES

(a) *Amendments without consideration.* (1) Where an actual or threatened loss on a defense contract, however caused, will impair the productive ability of a contractor whose continued operation as a source of supply is found to be essential to the national defense, the contract will generally be equitably adjusted to the extent necessary to avoid such impairment of the contractor's productive ability.

(2) Where a contractor suffers a loss (not merely diminution of anticipated profits) on a

defense contract as a result of Government action, the character of the Government action will generally determine whether any adjustment in the contract will be made and its extent.

(i) Where the Government action is directed primarily at the contractor and is taken by the Government in its capacity as the other contracting party, the contract may be equitably adjusted if fairness so requires. Thus, where such Government action, although not creating any liability on its part, increases the cost of performance, considerations of fairness may make appropriate some equitable adjustment in the contract.

(ii) When the action is not taken by the Government in its capacity as the other contracting party, but in its sovereign capacity, relief will generally not be granted. However, exceptional cases, depending on the nature of the action, the circumstances, and the effect on the contractor, may require an equitable adjustment in the contract when necessary to insure maximum cooperation and production in the national defense effort.

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